Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

FRANCINE ROBERTS,

Petitioner,

versus

RODNEY SLATER, SECRETARY, DEPARTMENT OF TRANSPORTATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. DOES THE HOLDING OF FARAGHER V. CITY OF BOCA RATON APPLY TO CO-WORKER SEXUAL HARRASSMENT UNDER TITLE VII, IF SO, DID THE EMPLOYER FAIL TO ESTABLISH THE AFFIRMATIVE DEFENSE THAT IT EXERCISED REASONABLE CARE TO PREVENT AND CORRECT PROMPTLY ANY SEXUALLY HARRASSING BEHAVIOR, WHERE PETITIONER ADDUCED EVIDENCE IN HER CASE THAT A SUPERVISOR OF THE EMPLOYER KNEW THAT A CO-WORKER HAD SEXUALLY HARRASSED OTHER WOMEN AND FAILED TO INVESTIGATE, DOCUMENT OR REPORT THE SEXUAL HARRASSMENT TO UPPER MANAGEMENT AND SUCH FAILURE WAS APPROXIMATE CAUSE OF THE CO-WORKERS SEXUAL HARRASSMENT OF OTHER WOMEN INCLUDING PETITIONER.

II. WHETHER THERE EXISTED A GENUINE ISSUE OF FACT AS TO WHETHER THE EMPLOYER TOOK MEASURES PROMPTLY TO REMEDY THE PROVEN SEXUAL HARASSMENT AGAINST THE PETITIONER?

III. WHETHER THE LOWER COURT INCORRECTLY WEIGHED THE DIRECT EVIDENCE OF THE HARASSMENT, AND INSTEAD, PLACED A HEAVIER BURDEN OF PROOF UPON THE PETITIONER IN ORDER TO BE COMPENSATED?

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Fourth Circuit dated September 20, 1999, is set forth in the Appendix, p. 1a. (1999 LEXIS 22774). The opinion of the United States District Court for the Eastern District of Virginia at Alexandria dated January 22, 1999 is set forth in the Appendix, p. 3a.

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

The statutory provision for this Court's jurisdiction is 28 U.S.C. Section 1254. The United States Court of Appeals for the Fourth Circuit issued its Decision in this case on September 20, 1999. This Petition was timely filed after the Fourth Circuit's opinion.

CONSTITUTIONAL, STATUTORY AND ORDINANCE PROVISIONS INVOLVED IN THIS CASE

1. Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. Section 2000e et. seq.

42 U.S.C. Section 2000e-2 provides:

Unlawful Employment Practices

(a) Employer practices

It shall be an unlawful employment practice for an employer - to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of

employment, because of such individual's race, color, religion, sex or national origin...

STATEMENT OF THE CASE

Francine Roberts, the Plaintiff-Appellant, (hereinafter referred to as the "Petitioner") was employed as a flight service specialist at the Leesburg Automated Flight Service Station, a facility operated by the FAA within the Department of Transportation, the Defendant-Appellee, (hereinafter referred to as the "Employer").

At the Leesburg station, there was another employee named Larry Martin, (hereinafter referred to as the "harasser"), who was an electronics technician.

In December of 1994, the harasser began to make unwelcome sexual advances towards the Petitioner, including making remarks with sexual overtones to the Petitioner about her appearance, clothing and eyes, and making actions consisting of gestures permeated with sexual overtones and innuendo. On several occasions, the harasser touched the Petitioner. In January of 1995, the Petitioner experienced a greater amount of sexual comments and touchings by the harasser. By the last week in February, the Petitioner could no longer subject herself to the harassment. The Petitioner spoke with other female employees and discovered that he had been harassing other employees, and that, in fact, his supervisor had warned him in the past not to harass another female. On March 2, 1995, he invaded her office and private belongings and became physical. On March 3rd, he once again began to grab her personal belongings and make sexual connotations. On March 10th, the Petitioner and another

female employee complained to their supervisor. Their supervisor told the harasser's supervisor who responded that he had violated his direct order not to speak with the women. The complaint was forwarded to the higher authorities of the Employer. Two other women complained to the Employer.

During an investigation, the Petitioner discovered that three years earlier, the harasser was sexually harassing a female secretary, which was witnessed by other employees. However, the Employer never investigated, documented, or reported to upper management of the incident. The harasser's supervisor never ordered any training in sexual harassment for his employee and never notified anyone of the complaints.

On March 13, 1995, the harasser was temporarily assigned to another building while the investigation was ongoing. The harasser denied any wrongdoing and alleged that the Petitioner's complaint was racially motivated.

On April 17, 1995, the Employer's investigator reported that there was a potential for a hostile work environment because of the harasser's behavior. The Employer's Civil Rights Division also concluded that the harasser created a hostile work environment and that it was in the Employer's best interest not to reassign the harasser to the same building as the Petitioner. The Security Division acknowledged that the harasser created a potential violation of agency policy against sexual harassment, by failing to provide a workplace where employees are treated with dignity and respect and is free of sexual harassment. On May 10th, the harasser received a letter of reprimand but was then directed to report to work in the same building as the Petitioner. The Petitioner was forced to take several days off

as "traumatic leave" due to the harasser's return. The Petitioner was forced to seek counseling and was diagnosed with suffering from an acute stress disorder with symptoms of tension, fear and abdominal upset and a feeling of unease, as a direct result of the harassment experienced at work.

The Petitioner returned to work on June 30, 1995. The harasser went out of his way to intimidate her. In August the harasser was offered a transfer, a promotion, and a salary increase.

The Petitioner filed a formal Equal Employment Opportunity complaint alleging sexual discrimination on July 14, 1995. The agency did not attempt to interview witnesses until September 18, 1997. In a decision dated July 13, 1998, the EEO determined that "the harassment had the effect of unreasonably interfering with the work environment and/or creating an intimidating, hostile, or offensive work environment".

On May 26, 1998, the Petitioner filed suit against the Employer in the United States District Court for the Eastern District of Virginia at Alexandria asserting a claim under Title VII of the Civil Rights Act of 1964. She alleged sexual discrimination in the terms and conditions of employment due to hostile work environment. In response, the Employer filed a Motion for Summary Judgment.

On January 22, 1999, the District Court granted summary judgment against the Petitioner. The court ruled that the allegations of harassment were not sufficiently severe to create a hostile or abusive work environment. Also, the court ruled that the harassment was not attributable to the Employer because it took prompt corrective action.

The Petitioner filed a Notice of Appeal to the Circuit Court of Appeals for the Fourth Circuit. The Circuit Court affirmed the District Court's decision on September 20, 1999. The Circuit Court held that the transfer of the harasser to another location was an adequate remedy as a matter of law. Also, the Circuit Court did not discuss the issue as to whether the conduct amounted to harassment.

The Petitioner has filed a Petition for Certiorari based upon the issues and argument presented herein.

ARGUMENT

I. DOES THE HOLDING OF FARAGHER V. CITY OF BOCA RATON APPLY TO CO-WORKER SEXUAL HARRASSMENT UNDER TITLE VII, IF SO, DID THE EMPLOYER FAIL TO ESTABLISH THE AFFIRMATIVE DEFENSE THAT IT EXERCISED REASONABLE CARE TO PREVENT AND CORRECT PROMPTLY ANY SEXUALLY HARRASSING BEHAVIOR, WHERE PETITIONER ADDUCED EVIDENCE IN HER CASE THAT A SUPERVISOR OF THE EMPLOYER KNEW THAT A CO-WORKER HAD SEXUALLY HARRASSED OTHER WOMEN AND FAILED TO INVESTIGATE, DOCUMENT OR REPORT THE SEXUAL HARRASSMENT TO UPPER MANAGEMENT AND SUCH FAILURE WAS APPROXIMATE CAUSE OF THE CO-WORKERS SEXUAL HARRASSMENT OF OTHER WOMEN INCLUDING PETITIONER.

If this Court determines that the Petitioner's Writ of Certiorari should be granted, the Court must determine the

liability of the employer and an adequate remedy for the employee in situations where the victim of harassment does not submit to the sexual advances of the harasser and continues to be subjected for a period of time to the misconduct and the Employer is on notice of the harassment, because of previous victims. Moreover, it should be the role of the jury to determine whether unwelcome and offensive sexual remarks, innuendo, gestures, and physically intimidating conduct by a male employee was severe enough to create an abusive working environment in violation of Title VII of the Civil Rights Act..

Title VII of the 1964 Civil Rights Act prohibits "discrimination...because of...sex," including sexual harassment directed at an employee because of her sex. *Oncale v. Sundowner Offshore Services*, 66 U.S.L.W. 4175 (U.S. March 5, 1998). *In Meritor Savings Bank v. Vinson,* 477 U.S. 57 (1986) and *Harris v. Forklift Systems, Inc.*, 114 S.Ct. 367 (1993), this Court relied upon the position taken by the Equal Employment Opportunity Commission (EEOC) that there are two types of sexual harassment prohibited in Title VII. The first, "abusive work environment" or "hostile work environment" sexual harassment. The second type of sexual harassment includes threats of harassment. *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554 (11th Cir. 1987). The Petitioner was subjected to both types of harassment so she should be entitled to an adequate remedy.

In assessing the Petitioner's Title VII claim against the Employer, the Fourth Circuit erred in its determination that the Employer cannot be liable on the grounds that they had taken action. However, the Circuit Court failed to address the issue of whether the Employer's acts were sufficient given the fact that the Employer was on notice of previous

harassment by the same employee and failed to take appropriate preventive action to avoid future harassment of co-workers. If the Employer took adequate and effective remedies after the 1992 incident, then the same employee would not have subjected the Petitioner to the harassment.

The Petitioner's case should have never been disposed of upon a summary judgment motion. The Petitioner by way of depositions, affidavits and other competent evidence showed a substantial and continuing hostile work environment. The Supreme Court has recognized a cause of action under Title VII for sex discrimination when the discrimination results in that person's workplace being turned into a hostile work environment, because a hostile work environment alters the "terms, conditions, or privileges of employment." *Meritor, supra*, at 477 U.S. 64-67. The District Court ruled that there were no material facts in dispute with respect to whether the conduct at issue amounted to harassment and whether the Petitioner's employer provided an effective remedy. The Circuit Court of Appeals affirmed the latter issue and did not discuss the first issue.

A prima facie case of sexual harassment is made when the plaintiff proves that (1) she was harassed because of her sex; (2) that the harassment was unwelcome; (3) that the harassment was sufficiently severe to create an abusive working environment; and (4) that some basis exists for imputing liability to the employer. *Wrightson v. Pizza Hut of America, Inc.*, 99 F.3d 138, 142 (4th Cir. 1996). Where the sexual harassment complained of is not so severe to create a subjectively and objectively hostile or abusive work environment, a prima facie case of Title VII discrimination has not been made. *See Faragher v. City of Boca Raton*, 118 S.Ct. 2275, 2283 (1998), citing, *Harris v. Forklift Systems,*

Inc., 510 U.S. 17, 19, 114 S.Ct. 367, 370, 126 L.Ed.2d 295 (1993); *Hoy v. Angelone*, 456 Pa.Super. 596, 691 A.2d 476 (1997) (the Court stated that being aware of the hostile environment is constructive notice to the employer to impose liability). The District Court only ruled that the harasser's acts did not amount to severe conduct necessary to prove a prima facie case of sex discrimination due to a hostile work environment.

Courts review the allegations to determine whether an environment is hostile or abusive "by looking at all the circumstances" alleged, paying special attention to (1) the frequency of the discriminatory conduct; (2) its severity; (3) whether it is physically threatening or humiliating, or a mere offensive utterance; and (4) whether it unreasonably interferes with an employee's work performance. *Id.*

The Fourth Circuit recognizes that the question whether harassment was sufficiently severe is a question of fact. *Paroline v. Unisys Corp.*, 879 F.2d 100, 105 (1989), *vacated in part on other grounds*, 900 F.2d 27 (1990). Courts and juries must "not mistake ordinary socialized in the workplace for discriminatory 'conditions of employment.'" *Oncale*, supra.

In *Paroline*, the Fourth Circuit stated:

> In a hostile environment case under Title VII, we will impute liability to an employer who anticipated or reasonably should have anticipated that the plaintiff would become a victim of sexual harassment in the workplace and yet failed to take action reasonably calculated to prevent such harassment. An

> employer's knowledge that a male worker has previously harassed female employees other than the plaintiff will often prove highly relevant in deciding whether the employer should have anticipated that the plaintiff too would become a victim of the male employee's harassing conduct. (citations omitted). Of course, an employer's knowledge of previous incidents of sexual harassment of other female workers will not necessarily indicate that an employer should have anticipated the plaintiff's harassment as well. But that is generally an issue for the factfinder, not one for the disposal on summary judgment.
> (emphasis added).

There is no dispute that the Petitioner and her co-workers were subjected to inappropriate comments and gestures over a period of three months, with the misconduct increasing in intensity over that period. There is no dispute that the Employer had notice of the harasser's conduct since there were complaints of his behavior in 1992. Since the Employer had notice, and they failed to act commencing in 1992, then the Employer must be held responsible. Even having prior notice of the harassment, the harasser was only temporarily removed from the facility. When he returned, the Petitioner was forced to take traumatic leave. The Employer was on notice of the harasser's acts, and they did not provide a quick and adequate remedy of the situation. His supervisors failed to act and initiate a closer supervisor of him. Since he had poor supervision, he continued to harass the Petitioner and other women, even when there were claims pending against him. There was no discipline imposed, not

in 1992 and not in 1995, since the harasser was given a promotion and pay increase. In fact, the remedy is clearly inadequate. The lower courts erred in stating that it was a proper remedy of the claim when the co-worker was reprimanded and transferred to another location, thus depriving him of the opportunity to continue mistreating the Petitioner. The remedy stopped the improper conduct and therefore was sufficient as a matter of law. The lower courts cited *Spicer v. Virginia Department of Corrections*, 66 F.3d 705, 711 (4th Cir. 1995) and *Burlington Industries, Inc. v. Ellerth,* 524 U.S. 742, 118 S.Ct. 2257, 2270-71, 141 L.Ed.2d 633 (1998) in support of their position. However, the Employer was on notice of the harassment, and reassigned the harasser back into the facility.

In *Faragher*, court ruled that an employer is subject to vicarious liability to a victimized employee for an actionable hostile environment. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence. The defense has two elements: (1) that the employer exercised reasonable care to proven and correct promptly any sexually harassing behavior; and (2) that the plaintiff employee unreasonably failed to take advantage of any prevention or corrective opportunities provided by the employer or to avoid harm otherwise. Id., at 59-60. While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law a valid defense. No affirmative defense is available when the harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment. *Id*; *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 2257, 141 L.Ed.2d 662 (1998).

In our case, the Employer is barred from raising the affirmative defense. The first element is not met since the Employer had prior notice of the harasser's conduct and failed to remedy the situation. The Employer's supervisory staff was to closely monitor the operation floor and watch the employees. The fact that the harasser was giving unwelcome attention to the Petitioner as well as two other employees for a three to six month period should have promptly the supervisors to recognize the harasser's whereabouts. A reasonably jury could find that the supervisors had to know that the harasser was bothering Petitioner and other women, and did not do anything. Moreover, the harasser's supervisor knew of his conduct in 1992 when other female employees complained; however, no remedy was taken. The Employer did have prior notice of his acts.

The second element of the defense is also not proven. The Petitioner filed a formal Equal Employment Opportunity complaint alleging sexual discrimination on July 14, 1995. The agency did not attempt to interview witnesses until September 18, 1997. In a decision dated July 13, 1998, the EEOC determined that "the harassment had the effect of unreasonably interfering with the work environment and/or creating an intimidating, hostile, or offensive work environment". The Petitioner took advantage of filing an EEOC claim as a measure to prevent future harm. Furthermore, since the Petitioner was forced to take traumatic leave when she learned that the harasser returned to the facility substantiates a tangible employment action leaving no affirmative defense available.

Determinations of motive and intent, particularly in discrimination cases are questions better suited for the jury. *Petitti v. New England Telephone and Telegraph Co.*, 909

F.2d 28, 34 (1st Cir. 1990). Obviously, the Employer's motive and intent were central issues to the underlying cause of action - why they failed to cure a hostile work environment, why they failed to take appropriate permanent corrective action once they had direct evidence that harassment occurred, and why they promoted an employee and gave him a salary increase when there was direct evidence and an investigation proving that he harassed female workers. Employment discrimination cases should be disposed of at summary judgment only with "extreme caution". *See Beard v. Annis*, 730 F.2d 741, 743 (11th Cir. 1984).

Discrimination can be proved with direct or indirect evidence. *Meeks v. Computer Data Association International*, 15 F.3d 1013, 1019 (11th Cir. 1994); including presenting a statistical pattern in the actual workplace where the discrimination occurred. *Earley v. Champion International Corp.*, 907 F.2d 1077, 1081 (11th Cir. 1990). The Petitioner showed a pattern of discriminatory actions against her and other female employees. When there is evidence of disparate treatment as well as other circumstantial evidence, there is sufficient evidence of proof of pretext discrimination; the evidence does not need to reach the degree of certainty required of plaintiffs who present no proof of discrimination besides disparate treatment. *Scott v. County of Ramsey*, 180 F.3d 913 (1999).

The Petitioner showed a pattern of discriminatory behavior both prior to and after her complaints with the Employer thereby meeting her burden of proof to overcome a motion for summary judgment. *Smith v. St. Louis University*, 109 F.3d 1261 (8th Cir. 1997); *Harris, supra*, at 21. A statistical evidence of pattern of discrimination coupled with

other evidence is a pretext for an employment discrimination case. *Bell v. Bolger*, 708 F.2d 1312 (1983). The statistical pattern is direct evidence that overcomes the standard for a motion for summary judgment. *See Kerns v. Capital Graphics, Inc.*, 178 F.3d 1011(1999).

II. THERE EXISTED A GENUINE ISSUE OF FACT AS TO WHETHER THE EMPLOYER TOOK MEASURES PROMPTLY TO REMEDY THE PROVEN SEXUAL HARASSMENT AGAINST THE PETITIONER.

The Supreme Court has made employers vicarious liable for unlawful harassment. *See Burlington Industries, supra*; *Faragher, supra*. The purpose of these previous ruling was to encourage employers to prevent harassment. But if there is a none harassment environment and there is no sufficient remedy, the Employer must be held liable.

In our facts, the Employer failed to take permanent measures to stop the harassment. At first, the harasser was temporarily reassigned, and, then, after the second complaint, the Employer gave him a promotion and salary increase and then transferred him to a new building. Upon further investigation, the Petitioner discovered the harasser harassed women in the workplace commencing in 1992, and his supervisors and the Employer failed to take any action against him. There is a genuine issue of fact as to whether the remedy was adequate in the Petitioner's facts.

Since the Petitioner cannot impose individual liability under Title VII[1], she is left without a remedy if the Employer

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[1] The First Circuit had declined to answer the question, describing the issue of individual liability under Title VII as "potentially difficult".

is not held responsible. *See Tomka v. Seiler Corp.*, 66 F.3d 1295, 1313 (2nd Cir. 1995); *Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507, 512 (4th Cir.), *cert. denied*, 513 U.S. 1058, 115 S.Ct. 666, 130 L.Ed.2d 600 (1994); *Williams v. Banning*, 72 F.3d 552 (7th Cir. 1995). Obviously, the Petitioner was subjected to sexual harassment by clear and convincing direct evidence. By stating that the Petitioner's problem was cured by the removal of the harasser does not compensate her for past compensatory and other damages. The Employer was on notice of the sexual harassment; they had previously temporarily removed the harasser from the same building as the Petitioner. So when the harassment commenced when he returned to the building, the Employer's action of later permanently transferring him and increasing his salary was not an adequate remedy for the Petitioner. Moreover, the harasser's supervisor was aware of his acts since there were complaints three years earlier from other workers. The supervisor never reported the incidents and never instructed the harasser to attend a sexual harassment course. The Employer was reckless in their act by not permanently removing the harasser from the premises after they concluded that the Petitioner was sexually harassed.[2]

Serapion v. Fred H. Marrtinez, 1997 WL 394605 (1st Cir. 1997).

[2] The Civil Rights Act of 1991 was included in large part because Congress recognized that Title VII had not previously provided adequate compensation for the harm suffered by victims of discrimination, and of sexual harassment in particular. Civil Rights Act of 1991, Pub.L.No. 102-166 Section 3(1), 105 Stat. 1071, 1071 (1991) (listing among statute's purposes "to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace"). H.R. Rep.No. 40, 102nd Cong. ,1st Sess.; pt. 2, at 1 (1991), reprinted in 1991 U.S.C.C.A.N. 694, 694 (Act was intended "to provide more effective deterrence and adequate compensation for victims of discrimination"); *Id.*, at 25, 1991 U.S.C.C.A.N. at 718 (discussing the problem of inadequate compensation for victims of discrimination, focusing primarily on "the severe consequences of the lack of a damages remedy

The Employer was on notice, actually since 1992, the sexual harassment reoccurred, and the Petitioner suffered damages. The same harasser had previously harassed another female employee, the supervisor failed to properly investigate the harassment, to discipline the harasser or to require counseling and sexual harassment training. The Employer did not exercise reasonable care as alleged by the lower courts. Reasonable care would have been to take action in 1992. But for the Employer's lack of response to the 1992 complaint, the Petitioner experienced sexual harassment.

The Petitioner met her burden of proof to overcome a summary judgment motion and to rule otherwise would be an overburden to any burden seeking damages for being subjected to sexual harassment in the workplace. Emotional distress, including but not limited to severe psychological injury, is unquestionably one aspect of the harm that sexual harassment produces. *Harris, supra*, at 22.

Discrimination exists "in forms as myriad as the creative perverseness of human beings can provide." *McCorstin v. United States Steel Corp.*, 621 F.2d 749, 753-54 (5th Cir. 1980). Therefore, the Petitioner's claim should not have been disposed of upon summary judgment and she should be adequately compensated for her damages since the current remedy does not justify the Employer's acts of poor supervision, poor procedures in preventing a known harasser's acts and poor procedures in remedying a known hostile work environment.

This Honorable Court must grant this Petition for Certiorari so that it may clarify the standard when there is a

in Title VII for claimants who suffered severe harassment on the job").

pattern and history of discriminatory acts, further develop the Petitioner's burden of proof, and order that the remedy was inadequate.

III. THE LOWER COURT INCORRECTLY WEIGHED THE DIRECT EVIDENCE OF THE HARASSMENT, AND INSTEAD, PLACED A HEAVIER BURDEN OF PROOF UPON THE PETITIONER.

Does not the mere acquiescence of a knowing pattern of harassment justify a cause of action against an Employer?

The lower courts erred in ruling that since the harasser was ultimately transferred out of the facility on a permanent basis, with only limited access to return, the Employer provided an adequate remedy to the Petitioner. The courts used the standard of "prompt and adequate remedial action" and stated that the law does not require an employer to discharge every employee accused of sexual harassment, see *Harris v. L&L Wings, Inc.*, 132 F.3d 978, 984 (4th Cir. 1997), and because the gravity of the alleged harassment helps determine what is a reasonable corrective action, *Baskerville v. Culligan International Co.*, 50 F.3d 428, 432 (7th Cir. 1995), the courts erroneously agreed that the Employer's corrective actions were both prompt and adequate in this case. Transferring the harasser to a better position with a higher pay is not an adequate remedy - it is an award to the harasser for sexually harassing women. It was a clear inadequate remedy - awarding the harasser and punishing the victim, the Petitioner.

The Employer had concrete factual evidence of the sexual harassment and hostile work environment, but took no

effectual action to correct the situation. *Katz v. Dole*, 709 F.2d 251, 256 (4th Cir. 1983).

Under the Civil Rights Act, a complaining party may recover punitive damages if he/she demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual. 42 U.S.C. Section 1981(b)(1). The plain meaning of the provision is that once a plaintiff has put forward sufficient evidence to go to the jury on the issue of intentional discrimination, he or she may also go the jury on the question of punitive damages. *Kolstad v. American Dental Association,* 139 F3d 958 (D.C. Cir. 1998). Therefore under the Civil Rights Act, once there is a discriminatory practice, a plaintiff may recover punitive damages.

Why should Title VII not follow the same standard as other statutes, especially since the Civil Rights Act furthers damages occurred in a Title VII case? The Petitioner established by sufficient direct evidence that she was sexually harassed, she should be compensated for her damages, such as her stress and humiliation. One of the fundamental problems driving the effort to pass the Civil Rights Act of 1991 was the inadequacy of remedies for intentional violations of Title VII. The remedies available for intentional violations of Title VII does not include the common-law compensatory and punitive damages that are available for violations of 42 U.S.C. Section 1981 and for violations of Title IX of the Education Amendments of 1972, 20 U.S.C. Section 1681. The Title VII remedies do not even include the punitive "liquidated damages" available for violations of the

Age Discrimination in Employment Act, 29 U.S.C. Section 626(b).

The Petitioner submitted evidence of her emotional injury, which should be compensated. *See McKinnon v. Kwong Wah Restaurant*, 83 F.3d 498 (1st Cir. 1996); *Patterson v. PHP Healthcare Corp.*, 90 F.3d 927 (5th Cir. 1996), *cert. denied*, 519 U.S. 1091 (1997); *Hetzel v. County of Prince William*, 89 F.3d 169 (4th Cir.), *cert. denied*, 519 U.S. 1028 (1996).

By making punitive damages available in Title VII cases, Congress chose to establish an additional means for punishing defendants who have engaged in intentional discrimination with malice or with reckless indifference to the rights of their victims. Anti-discrimination statutes are of the "highest priority" and that "in enacting Titlle VII of the Civil Rights Act of 1964, Congress intended to prohibit all practices in whatever form which create inequality in employment due to discrimination." *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 763 (1976). Title VII has two distinct, but related, central statutory purposes: (1) eradicating discrimination throughout the economy, and (2) making persons whole for injuries suffered through past discrimination. *Landgraf v. USI Film Products, et. al.*, 511 U.S. 244, 254 (1993). (emphasis added). Obviously, the Petitioner does not have to be subjected to sexual harassment presently to be compensated, but she should be compensated for her past experiences.

CONCLUSION

The Fourth Circuit and the District Court of Virginia have placed a high burden of proof upon the Petitioner to overcome a summary judgment motion. The Court should grant certiorari to review this important matter, clarify the parties burden, order a proper remedy for the Petitioner, reverse the Fourth Circuit's and District Court's opinion, and order that the Petitioner was sexually harassed.

Respectfully Submitted,

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1999 U.S. App. LEXIS 22774, *

FRANCINE ROBERTS, Plaintiff-Appellant, v. RODNEY SLATER, SECRETARY, DEPARTMENT OF TRANSPORTATION, Defendant-Appellee.

No. 99-1262

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

1999 U.S. App. LEXIS 22774

August 24, 1999, Submitted
September 20, 1999, Decided

COUNSEL: Terrell N. Roberts, III, ROBERTS & WOOD, Riverdale, Maryland, for Appellant.

Helen F. Fahey, United States Attorney, Rachel C. Ballow, Assistant United States Attorney, Alexandria, Virginia, for Appellee.

JUDGES: Before WIDENER, WILKINS, and MOTZ, Circuit Judges.

OPINION: OPINION

PER CURIAM:

Plaintiff Francine Roberts appeals from the district court's decision granting summary judgment in favor of Defendant Rodney Slater, Secretary of Transportation, on her claim of sexual harassment. The court ruled that there were no

material facts in dispute with respect to whether the conduct at issue amounted to harassment and whether Roberts's employer provided an effective remedy. We agree with the court's ruling on the latter issue; accordingly, we do not reach the first issue, and we affirm.

The record indicates that Roberts's co-worker subjected [*2] her to inappropriate comments and gestures over a period of three months, with the misconduct increasing in intensity over that period. When she and other victims of the same co-worker advised their supervisor of his conduct, the co-worker was reprimanded and transferred to another location, thus depriving him of the opportunity to continue mistreating Roberts. This remedy stopped the improper conduct and therefore was sufficient as a matter of law. See cf. Thus, the grant of summary judgment in favor of the Defendant was proper. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVSION

CIVIL ACTION NO. 98-736-A

FRANCINE ROBERTS, Plaintiff

v.

RODNEY SLATER, SECRETARY, DEPARTMENT OF TRANSPORTATION, Defendant.

This matter comes before the Court on Defendant's Motions for summary Judgment and Involuntary Dismissal, Plaintiff, Francine Roberts ("Roberts"), has brought suit alleging sexual discrimination. through the creation of a hostile work environment in violation of Title VII of the Civil Rights Act. See 42 U.S.C A. § 2000e et seq. 2000e-16.

Roberts is employed as an Air Traffic Control Specialist at the Leesburg, Virginia Automated Flight Service Station ("DCA AF SS"). This facility is operated by the Federal Aviation Administration ("FAA"), within the Department of Transportation. Plaintiff's primary job-related duties are to provide weather and other related briefings to pilots.

In December, 1994. Roberts alleges that Larry Martin, also employed at DCA AF SS. began to make unwelcome sexual advances towards her. These overtures included touching the back of Roberts' arm; spending an

inordinate amount of time around Roberts while she was working and making sexually offensive statements to her, including "Do you know how ravishing you look?'' Roberts first ignored Martin. When this proved unsuccessful, she directly asked him to cease this conduct towards her.

Roberts alleges that Martin continued in his behavior in January and February, 1995, but that in March. 1995 his behavior got much worse. Roberts complains of an incident on March 2, where Martin approached her at her work station where she was sitting and stood directly over her so as to make her feel uncomfortable. Roberts responded to this invasion of her private space by standing up, facing the console, and placing her foot on her chair. Roberts alleges that Martin then kicked the chair out from under her leg, resulting in Roberts and Martin standing face-to-face at a very close range. Martin took stock of the situation, and then said: "You look like you are looking for a fight. Why don't you and me wrestle right here on the floor?"

Upon being rebuffed by Roberts, Martin then sat down at Roberts' desk and began to rifle through her personal effects. Roberts then walked over to a co-worker's desk to escape Martin's attention. While Roberts was at the co-worker's desk, Martin unplugged the end of the telephone cord at Roberts' desk, and then threw it on the floor. Roberts proceeded back to her desk to plug in her phone, but Martin grabbed the cord and threw it on the floor again, Then Roberts' phone rang, and at that time Martin plugged the cord back into the phone.

The very next day, March 3, 1995, as Roberts was getting ready to leave for the day. Martin followed Roberts into the facility's break room. Only Roberts and Martin were in the room. Roberts alleges that Martin then approached her

and said: "Good, I finally got you trapped in the corner right where I want you. Let me help you on with your coat." Roberts put her arm in her coat without any assistance from Martin, and told him to "back off. Roberts then asked Martin to move out of the way, as he was blocking her exit. Roberts successfully navigated her exit from the room, though Martin was persistent in his desire to walk with her.

Roberts alleges that Martin's conduct distracted her, thus interfering with her ability to perform her job. Further, Roberts states that Martin's conduct made her fearful. nervous and upset, leading to physical symptoms including skin rash, insomnia, stomach pains, dizzy spells, irritability and crying spells.

On March 10, 1995, a supervisor was informed that Martin had been sexually harassing Roberts and two other female employees at DCA AF SS. While the supervisor directed Martin to avoid all contact with the females at the facility, Roberts alleges that Martin ignored this order and approached her to ask ''Have I offended you?" Martin was then detained outside of DCA AF SS pending an investigation of the allegations of sexual harassment.

The supervisors conducting the investigation finally concluded that there was insufficient evidence to sustain the allegations of sexual harassment, even though they were aware of similar allegations concerning another employee years before. They then directed Martin to return to DCA AF SS. Upon Martin's return to work. Roberts requested traumatic leave.

Roberts brings suit against the Secretary of Transportation because it is her allegation that despite knowledge of Martin's propensity for sexual harassment, the

FAA failed to take prompt corrective action to discipline Martin and to prevent recurrences. Furthermore, Roberts alleges that the supervisors at DCA AF SS failed to properly document complaints or incidents of sexual harassment brought to their attention, and that they failed to ensure that appropriate discipline and training were given to those accused of harassment. In other words. the supervisors allowed a hostile work environment to flourish, and she was made to suffer because of it. Roberts is demanding $300.000 in compensatory damages and an injunction which would force the Secretary of Transportation to take any appropriate action to ensure that Martin will never have any contact with Roberts while both continue in the Department of Transportation's employ

The Defendant (''U.S'') moves for summary judgment. Summary judgment is appropriate when there is no genuine issue as to any material fact. See FED. R. Civ. P. 56(c). Once a motion for summary judgment is properly made and supported, the opposing party has the burden of showing that a genuine dispute exists. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp. 475 US 574, 586-87 (1986). A material fact in dispute appears when its existence or non-existence could lead a jury to different outcomes. See Anderson v Liberty Lobby., 477 U.S. 242. 24S (1 986). A genuine issue exists when there is sufficient evidence on which a reasonable jury could return a verdict in favor or of the nonmoving party. See id. Unsupported speculation is not enough to withstand a motion for summary judgment See Ash v. United Parcel Serv., Inc., 800 F.2d 409.41 1-12 (4th Cir, 1986). Summary judgment is appropriate when after discovery, a party has failed to make a "showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial.'' Celotex Corp. v. Catrett. 477 U.S. 317. 322 (1986).

When a motion for summary judgment is made, the evidence presented must always be construed in the light most favorable to the nonmoving party. See Smith v. Virginia, Commonwealth Univ., 84 F.3d 6 72. 6 —5 (4th Cir. 1996)(en banc). .

According to Title VII, an employer cannot "fail or refuse to hire or to discharge ... or otherwise discriminate against any and individual with respect to his compensation terms, conditions, or privileges of employment, because of such individual's sex.'' Id., at § 2000e 2(a)(l). The Supreme reme Court has recognized a cause of action under Title VII for sex discrimination when the discrimination results in that person's workplace being turned into a hostile Work environment, because a hostile work environment alters the "terms, conditions, or privileges of employment." Meritor Savs, Bank v. Vinson 477 U.S. 57, 64-67, 106 S.Ct. 2399, 2403-05.91 L.Ed.2d 49 (1986).

A prima facie case of sexual harassment is made when the Plaintiff prove that (1) was harassed because of her sex; (2) that the harassment was unwelcome; (3) that the harassment as sufficiently sufficiently severe or pervasive to create an abusive working environment: and (4) that some basis exists for imputing liability to the employer. Wrightson v. Pizza Hut of America, Inc F.3d 128, 142 (4th Cir. 1996). Where the sexual harassment complained of is not so severe or pervasive as to create a subjectively and objectively hostile or abusive work environment, a prima facie case of Title VII discrimination has not been made. See Faragher v. City of Boca Raton, 118 S.Ct. 2275, 2283 1998) (citing Harris v. Forklift Sys., Inc., 510 U.S. 17. 19. 114 S.Ct. 367, 370. 126 LEd.2d 295 (1993)).

Courts review the allegations to determine whether an environment is hostile or
abusive "by looking at all the circumstances alleged, paving special attention to (1) the frequency of the discriminatory conduct; (2) its severity; (3) whether it is physically threatening or humiliating, or a mere offensive utterance; and (4) whether it unreasonably interferes with an employees work performance. Id. However, the aim of Title VII is not to create "a general civility code," Oncale v. Sundowner Offshore Services., 118 U.S. S. Ct. 998, 1002, 140 L.Ed.2d 201 (1998). and Title VII is not a 'federal guarantee of refinement and sophistication in the workplace." Hartsell v. Duplex Products. Inc., 123 F.3d 766. 773 (4th Cir. 1997). Title VII is not concerned with "simple teasing. (Oncale, 118 1 S. Ct. at 1002, off-hand comments are isolated incidents. Faragher, 118 18 S.Ct. at 2283. Rather, as stated above, only severe or pervasive conduct which alter's the terms and conditions of employment will result in a Title VII claim accruing.

The reason summary judgment is appropriate in this case is because Roberts' allegations. when taken as true, do not amount to the severe or pervasive conduct necessary to prove a prima facie case of sex discrimination due to a hostile work environment

First, it is questionable whether the frequency of the discriminatory conduct is so pervasive so as to warrant a finding of a hostile work environment. While a handful of comments spread over months is not so likely to have so great an emotional impact as a concentrated or incessant barrage. Hopkins v. Baltimore Gas & Elec. Co., 77 F3d 745. 753. it is not certain whether there were only a handful of comments spread out over months in this case, or Martin's comments were incessant. Even if the Court accepted as true

that Martin's comment in December, 1994 ("Do you know how ravishing you look?"), was as the beginning of the harassment (and it is well settled that this comment. even when combined with telling the person that she is pretty, does not establish an actionable Title VII claim. Baskerville v. Culligan Int'l Co., 50 F.3d 428, 430-31 (7th Cir. 1995) cited in Hopkins, 77 F.3d at 754.)) was the starting point of the alleged harassment, there is scant evidence in the record that anything happened between this statement and the events of march 2 and 3, 1995. All Roberts states is that Martin continued his behavior in the first two months of 1995. She doesn't say whether sexual comments and innuendo from Martin occurred on a daily, weekly, or bi-weekly basis. All she says is that they occurred. Because of this, this Court is in no position to state definitively that the frequency of the discriminatory conduct would lead a reasonable person to conclude that the harassment was sufficiently severe or pervasive to create an abusive working environment regarding the severity of the allegations, the Court is troubled by Martin's acts of March 2 and March 3, 1995. However, the Court finds that the acts alleged, when taken as true do not rise to the level of severity actionable under Title VII. In Hopkins the plaintiff alleged that the harasser bumped into him, positioned a magnifying glass over his crotch, kissed the as a way way of congratulating him, and stared at the plaintiff while the plaintiff was in the bathroom. This Court cannot say that Roberts' allegations, while certainly troubling, rise to this level. Roberts claims that Martin touched her on the arm, told her she looked nice, spent an inordinate amount of time near her, engaged in sexual innuendo, rifled through her desk, unplugged her phone cord, and told her he was going to help her put on her coat. Like in Hopkins, there is no indication that Martin ever touched Roberts in a sexual manner. This leads the Court to find that the severity of Martin's actions do not, on their own. support a finding the harassment

sufficiently severe or pervasive as to create an abusive working environment.

Regarding whether Martin's actions and words were physically threatening or humiliating as compared to mere offensive utterances, the Court is of the opinion that in this case there was some of both. While the Court is not familiar with the height and weight of Martin and Roberts, the Court can conceive that martin's concerning Roberts in the break room would be considered physically threatening by a reasonable person. And if Martin consistently hovered over Roberts while she worked, this too could be considered physically threatening to a reasonable person, as Roberts says it was. However, a reasonable person would consider some of the statements and acts of Martin to be mere unpleasantness or horseplay, Which is not actionable under Title VII While asking a person of the opposite sex whether or not they wanted to wrestle has a sexual quality to it, the Court cannot conceive that this was either humiliating or physically threatening to Roberts, or that it would be so to a reasonable person. R Regarding the humiliation aspect. if anything, such a comment would redound to the detriment of Martin, as those within earshot would most likely consider him in a lesser light for making such a statement. Further, there is nothing in the record which indicates to the Court that Robbers considered, Martin to be serious when he made his offer. Even if Robbers subjectively though was serious a reasonable person would not consider such an offer physically threatening.

Last. concerning whether Martin's comments and conduct unreasonably interfered with Robbers' work performance, the Court certainly agrees that it interfered with Robbers' performance. as she considered taking traumatic leave to be in her best interest. However. on the facts of this

case, the Court is unwilling to find that a reasonable person would necessarily consider such conduct an unreasonable interference. In Hopkins, the Court noted with approval the decision in Morgan v. Massachusetts Gen. Hosp., 901 F.2d 186, 193 (1st Cir. 1990). wherein that Court said there was no unreasonable interference with work performance when plaintiff claimed that male co-worker stood behind him and bumped into him while he mopped, "peeped" at him in the restroom, and asked him to danee at a Christmas party. Not to denigrate the accusations in Robert's Complaint, but the Court cannot see how the conduct complained of in this case rises to the level of that in Morgan, where a finding of no unreasonable interference was found. In this case, there is no accusation that Martin endeavored to spy on Roberts while she was in any state of undress. While the Court can see the similarities between the asking a person to dance and playfully asking a person to wrestle; and between bumping into a person from behind and hovering over a person, the Court cannot find that the facts is of this case are more egregious than that in

When all of the above is considered as a whole, it is apparent to the Court that the conduct of which Roberts complains does not rise to the level of pervasive or severe so as to establish a prima facie case of sexual harassment under Title VII. To be sure, such conduct. if true, is boorish, unpleasant, and in ill-taste. However, as a matter of law such conduct does not create such a sufficiently hostile work environment under Title VII to be actionable.

Even assuming that the conduct complained of did constitute a hostile work environment. when Roberts notified her superiors they responded by taking reasonable and appropriate remedial action to stop Martin's conduct, thus insulating themselves from liability.

Roberts explained her discomfort with Martin's comments and behavior after being requested by a supervisor to do so on March 10, 1995. Air Traffic Manager Brame began to assemble the facts of the matter within days. Martin's supervisory chain a DCAAFSS was immediately notified. Both Air Traffic and Airways Facilities notified their management at John F. Kennedy Airport in the Eastern Region.

The first thing done after the verbal complaints on March 10th, was that Martin was notified on March 13th that he was detailed out of the Leesburg facility pending investigations by the Civil Rights Division and the Security Division (investigations occurred from March 1995 through April, 1995). Roberts did not see Martin between March 10 and Ma 11, 1995.

The Security Division determined there was a potential for a hostile environment Martin was then issued a Letter of Reprimand for 'unwelcome and unsolicited'' conduct that represented "inappropriate and unacceptable behavior in the workplace" A sector manager verbally instructed Martin, and a sexual harassment training was scheduled for Martin in June. Martin as then permitted to return to the facility on May 11, 1995, once the course of Corrective action had been chosen.

An employer may be liable for both negligent and intentional torts committed by all employees within the scope of his s employment. See Burlington Industries, Inc., v. Ellerth. U.S.S.Ct. 2257 S.Ct. 2266 (1998). An employer is liable with respect to sexual harassment if it knew or should have known about the conduct and failed to stop it. Negligence Sets a minimum standard for employer liability tinder Tithe VII.

Ellerth, ___U.S. at 118 ___S.Ct. at 2267: see also 29 C.F.R. 1604.11 (d) (1997). When employers are notified of claims of sexual harassment and then take prompt, adequate corrective measures, employers like the F.A.A. cannot be held liable for the hostile work environment Dennis v. County of Fairfax, 55 F3d 151, 156 (4th Cir. 1995). It appears to the Court that Roberts lawsuit is based on the fact that she does not like the actions taken, not that the FAA did not employ prompt adequate corrective actions. While it as Roberts' desire never to see Martin again, the Court cannot, as a matter of km. that this is the only corrective action reasonable under the circumstances. The end result of the FAA's actions is that since the day that Roberts reported Martin's conduct, she has not been bothered or confronted by Martin since. Further, Martin was ultimately transferred out of the Leesburg facility on a permanent basis, with only limited access to return, Because the legal standard of "prompt and adequate remedial action' does not require an employer to discharge every employee accused of sexual harassment, see Harris v. L & L Wings Inc., 132 F.3d 978, 984 (4th Cir. 1997), and because the gravity of the alleged harassment helps determine what is reasonable corrective action, See Baskerville. 50 F3d at 432, this Court finds that the FAA's corrective actions were both prompt and adequate in this is matter.

Because this memoranum Opinion results in a dismissal of the case, the Defendant's Motion for Involuntary Dismissal has become Moot, and the Court will not render its opinion on the matter.

An appropriate Order shall issue.

USDJ
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